

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In re:

Petters Company, Inc., et al.,

Debtors.

**Jointly Administered under  
Case No. 08-45257**

Court File No. 08-45257

(includes:  
Petters Group Worldwide, LLC;  
PC Funding, LLC;  
Thousand Lakes, LLC;  
SPF Funding, LLC;  
PL Ltd., Inc.;  
Edge One LLC;  
MGC Finance, Inc.;  
PAC Funding, LLC;  
Palm Beach Finance Holdings, Inc.)

Court Files Nos.:  
08-45258 (GFK)  
08-45326 (GFK)  
08-45327 (GFK)  
08-45328 (GFK)  
08-45329 (GFK)  
08-45330 (GFK)  
08-45331 (GFK)  
08-45371 (GFK)  
08-45392 (GFK)

Chapter 11 Cases  
Judge Gregory F. Kishel

Douglas A. Kelley, in his capacity as the  
court-appointed Chapter 11 Trustee of  
Debtor Petters Company, Inc., et al.

Plaintiff,

v.

Adv. Case Nos.:

Vlahos, et al.;	10-04201
Redstone Limited Partnership;	10-04202
Redstone American Grill, Inc.;	10-04203
Edgebrook, Inc.;	10-04204
Aron;	10-04205
Kanios, et al.;	10-04206
Hagan;	10-04207
Lynn Isaac, et al.;	10-04209
George Isaac, et al.;	10-04210
Papadimos;	10-04211
Svigos;	10-04212
Kenney;	10-04225
High Plains Investment LLC;	10-04250
Hauser;	10-04254

Hayden Fleming, et al.;	10-04255
Miller, et al.;	10-04256
Patrick Fleming, et al.;	10-04257
McCarthy, et al.;	10-04262
Allanson;	10-04263
Brennan;	10-04264
Kenneth Colvin, et al.;	10-04266
Electric Motor Supply Co.;	10-04267
Steve Feneis;	10-04268
Kabe;	10-04273
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Kuperus;	10-04277
Kyriakides;	10-04278
Jane Slobodyanuk;	10-04280
Slava Slobodyanuk;	10-04281
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Challenge Printing;	10-04290
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Alper;	10-04293
Mansour, et al.;	10-04296
Opportunity Finance, LLC, et al.;	10-04301
Larry Colvin, et al.;	10-04310
Kimberlee Colvin, et al.;	10-04311
Metro I, LLC, et al.;	10-04328
Carter;	10-04337
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Margolis;	10-04348
Metro Gem, Inc., et al.;	10-04352
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Joe;	10-04358
Tesar;	10-04359
Dorsey;	10-04360
O'Brien;	10-04361
Honig;	10-04362

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Sarenpa;	10-04363
Pernula;	10-04366
Schmit;	10-04367
Opportunity Finance, LLC;	10-04375
Toshi Investments, Ltd.;	10-04378
Idlewild Properties, LLC;	10-04380
Knoblach, et al.;	10-04382
Wright;	10-04385
Schopper;	10-04391
Monigan;	10-04395
Westford Special Situations Master Fund, L.P., et al.;	10-04396
Zhang;	10-04402
Lagermeier;	10-04403
Clayton;	10-04405
Hardy;	10-04408
Ratliff;	10-04409
Dunlap;	10-04410
Morgan;	10-04415
General Electric Capital Corporation;	10-04418
Romenesko;	10-04419
Associated Bank;	10-04422
Kenneth Johnson;	10-04423
Hodge;	10-04425
Lancer Financial Services, LLC, et al.;	10-04427
Cohen Partnership, et al.; and	10-04431
Ritchie Capital Management, L.L.C., et al.,	10-04440

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Defendants.

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**OMNIBUS SURREPLY MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS' MOTIONS TO DISMISS**

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Pursuant to the request of the Court on October 26, 2011, Douglas A. Kelley, Trustee (the “Trustee”) of the above-captioned debtors (“Debtors”), hereby submits this Omnibus Surreply Memorandum in opposition to the motions to dismiss filed in the above-captioned matters.<sup>1</sup>

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<sup>1</sup> The Trustee is represented by the following law firms in connection with the pending adversary proceedings: Lindquist & Vennum P.L.L.P.; Kelley, Wolter & Scott, P.A.; and Fruth, Jamison & Elsass, P.L.L.C. Lindquist & Vennum, P.L.L.P. and Kelley, Wolter & Scott, P.A., each file this Omnibus Surreply Memorandum and seek relief only with respect to the pending adversary proceedings for which the particular firm is the counsel of record.

## INTRODUCTION

The Trustee addresses four issues in this Omnibus Surreply Memorandum relating to the applicable statute of limitations and tolling. First, the Trustee will clarify the legislative history of the Minnesota Uniform Fraudulent Conveyance Act and the Uniform Fraudulent Transfer Act. Second, the Trustee will address the Minnesota case law that confirms that constructive fraudulent conveyance claims were recognized at common law. Third, the Trustee will address the Minnesota case law that confirms the state's consumer protection laws were not intended to codify common law. Lastly, the Trustee will rebut Defendants' argument that the federal concept of equitable tolling is not recognized by Minnesota courts. Addressing these points will confirm that the Minnesota fraudulent transfer statutes codified the common law and that—under the Minnesota Supreme Court's test in *McDaniel v. United Hardware Distrib. Co.*, 469 N.W.2d 84, 85-86 (Minn. 1991)<sup>2</sup>—the six-year limitations period of Minnesota Statutes § 541.05, subd. 1(6), and its corollary discovery rule, apply to all of the Trustee's fraudulent transfer claims.

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<sup>2</sup> The unpublished opinion of the Dakota County District Court in *Finn v. Alliance Bank*, No. 19HA-CV-11-2856 (Aug. 16, 2011), provided to the Court by defendants at the October 26, 2011 hearing, further confirms that the *McDaniel* test is the test this Court is required to apply to determine that Minnesota Statutes § 541.05, subd. 1(6) is the applicable statute of limitations. 2011 WL 5006458 (Pursuant to *McDaniel*, "statutes that codify Minnesota common law are not governed by the six-year limitations provision of § 541.05, subd. 1(2).") However, for the reasons stated herein, the *Finn* Court (1) erred in applying the *McDaniel* test because by looking to Arizona law the court failed to account for the common law constructive fraud claims recognized by Minnesota courts prior to the enactment of MUFCA, (2) incorrectly distinguished *Orr v. Kinderhill Corp.*, 991 F.2d 31 (2d Cir. 1993), based on Arizona law, (3) failed to analyze or distinguish the differences between the origins of consumer protection statutes and common law constructive fraud, (4) erroneously looked to Arizona law for the basis of its holding, (5) misinterpreted the holding of *Underleak v. Scott*, 134 N.W. 731, 733 (Minn. 1912), which confirms that Minnesota courts recognized constructive fraud claims at common law prior to 1921, and (6) ignores case law applying the discovery rule to claims for actual fraud.

## ARGUMENT

**I. Clarification of the Legislative History of the Minnesota Uniform Fraudulent Conveyance Act, which Confirms Fraudulent Conveyance Claims Originated at Common Law.**

**A. Minnesota First Codified Common Law Fraudulent Conveyance Claims Shortly after Statehood.**

Defendants have argued that the beginning point in time for the Court's analysis of the history of Minnesota's recognition of fraudulent transfer claims is when the Minnesota legislature adopted the Uniform Fraudulent Conveyance Act ("MUFCA"). Fraudulent transfer liability, however, has been a necessary companion to the relationship of debtors and creditors since the inception of early commerce. Recipients of fraudulent transfers have been required to answer to a transferor's creditors since the time of ancient Rome,<sup>3</sup> common law England, and common law in the early United States. Yet, defendants would have this Court ignore history and believe that in 1921 the Minnesota Legislature first "created" this type of liability.

Attached hereto, in an Addendum, is a table (with attached statutes) that summarizes the statutory changes in Minnesota's fraudulent conveyance statutes from 1851, shortly after Minnesota became a territory, through the adoption of the Minnesota Uniform Fraudulent Transfer Act ("MUFTA") in 1987.<sup>4</sup> Minnesota codified the preexisting common law of fraudulent conveyance applicable to real estate and personalty when it became a state in 1858. In 1863, the phrase "goods, chattels and things in action" was deleted from the non-trust statute, causing the source of a cause of action for fraudulent conveyance of non-trust goods, chattels and

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<sup>3</sup> See Hon. T. Albert, *The Insolvency Laws of Ancient Rome*, 28 Cal. Bankr. J. 365 (2006).

<sup>4</sup> A courtesy copy of the pertinent statutes identified within the Addendum is also enclosed herewith for the Court's convenience.

things in action to revert back to non-codified common law for nearly the next sixty years until MUFCA was enacted.

**B. Prior to 1921, Minnesota Courts Applied the Statute of Limitations Applicable to Claims “Grounded in Fraud” to Fraudulent Conveyance Claims.**

A comparison of the applicable statute of limitations adopted in 1851 to the current version at Minnesota Statutes § 541.05 confirms the Minnesota legislature has always drawn a distinction between claims based “upon a liability created by statute” and those claims “for relief on the ground of fraud.” *Compare* Minn. Terr. Stat. 1851, § 6 with Minn. Stat. § 541.05 (2009). In other words, there is nothing novel about the distinction made in § 541.05 between liability that is created by a statute, and claims that are grounded in fraud. This chart comparing the relevant provisions of each statute confirms the relevant provisions governing Minnesota statute of limitations today are substantially identical to those in place over 150 years ago and have remained so during the 150 years throughout:

<b>Minn. Terr. Stats. 1851</b>	<b>Minn. Stat. § 541.05</b>
<b>§ 6: Actions to be commenced within six years</b>	<b>Subd. 1: Actions to be commenced within six years</b>
2. An action upon a liability created by statutes, other than those upon a penalty or forfeiture:” <i>See</i> Gen. St. 1878, ch. 66, §6, subd. 2.	1(2): upon a liability created by statute, other than those arising upon a penalty or forfeiture or where a shorter provisions is provided by section 541.07. Subd. 1(2)
6. An action for relief, on the ground of fraud; the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud. <i>See</i> Gen. St. 1878, ch. 66, § 6, subd. 6.	1(6): for relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Subd. 1(6)

In 1922, after almost sixty years of fraudulent conveyance claims with respect to “goods, chattels and things in action” being grounded in un-codified common law, MUFCA became effective. Had the cause of action truly been “created by statute” in 1851 or 1858, two conclusions would follow. First, the cause of action would not have continued to exist at common law with respect to personality during the time period from 1863 through 1921, when MUFCA was adopted (effective January 1, 1922) again codifying the common law fraudulent conveyance cause of action. Second, and significantly, during that time period the Minnesota Supreme Court could have applied subdivision 2 of the statute of limitations governing liabilities created by statute. *See* Minn. Gen. St. (1878) ch. 66, § 6, subd. 2. It did not. The Minnesota Supreme Court repeatedly applied the discovery rule (subdivision 6) to fraudulent conveyance claims during the time period prior to 1922. It applied subdivision 6 to all causes of action for fraudulent conveyance, regardless of whether the cause of action was based upon codified common law (for realty) or un-codified common law (for personality).

The Minnesota Supreme Court has long applied the predecessor of Minnesota Statutes § 541.05, subd. 1(6) to fraudulent conveyance claims. *See, e.g., Johnston v. Johnston*, 119 N.W. 652, 654 (Minn. 1909); *Schmitt v. Hager*, 93 N.W. 110, 111 (Minn. 1903) (applying Gen. Stat. 1894, § 5136, subsec. 6 (the fraud discovery statute) to a fraudulent conveyance of real property prohibited by common law and Minnesota statute); *Brasie v. Minneapolis Brewing Co.*, 92 N.W. 340, 342 (Minn. 1902) (same); *Duxbury v. Boice*, 72 N.W. 838, 839 (Minn. 1897) (same); *Minneapolis Threshing Mach. Co. v. Jones*, 94 N.W. 551 (Minn. 1903) (same); *Stephon v. Topic*, 180 N.W. 221 (Minn. 1920) (citing *Duxbury* and applying fraud discovery statute to Gen. Stat. 1913 § 7010 prohibiting the fraudulent conveyance of goods, chattels, or things in action, made in trust). Defendants have argued the Minnesota Supreme Court cases so holding predate

MUFCA, but that argument only proves the Trustee's point because a codified cause of action in Minnesota law for fraudulent conveyance existed prior to the enactment of MUFCA. That is without dispute. Even more affirming of the Trustee's point is that the legislature—presumed to know existing case law (*Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 809 (Minn. Ct. App. 2000))—chose not to change the applicable common law fraud limitations period when it adopted MUFCA. When the legislature adopted MUFTA in 1987, it again chose not to include a limitations period in the statute, and while it adopted every section of the Uniform Fraudulent Transfer Act (“UFTA”), it did not adopt Section 9 – the limitations section. As a result, subdivision 1(6) continues to be the limitations period applicable to claims under MUFTA.<sup>5</sup> *See Palatine Nat'l Bank v. Strom (In re Strom)*, 97 B.R. 532, 539-40 (Bankr. D. Minn. 1989), and other cases cited at pages 25-26 of the Trustee's Omnibus Memorandum in Opposition to Defendants' Motions to Dismiss.

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<sup>5</sup> Section 9 contains the extinguishment provisions of the UFTA and was designed in part to bar actions asserted by the government under the rule set forth in *United States v. Summerlin*, 310 U.S. 414 (1940), that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights, whether it brings its suit in its own courts or in a state court. *See United States v. Bacon*, 82 F.3d 822 n.2 (9th Cir. 1996); *see also* UFTA cmt. 1 to Section 9. The motions to dismiss based on state statute of limitation analysis have focused on Minnesota law. However, the statute of limitations issue is also closely related to the “golden creditor” issue because the facts surrounding any limitations defense may be personal to that “golden creditor.” Because Minnesota did not adopt section 9 of the UFTA, should a federal agency of the United States qualify as a “golden creditor” much of this argument will cease to have any continued effect. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. DeQueen & E. R. Co.*, 271 F.2d 597 (8th Cir. 1959); *United States v. Wurdemann*, 663 F.2d 50 (8th Cir. 1981) (both applying *Summerlin*); *see also United States v. Bacon*, 82 F.3d 822 (9th Cir. 1996); *United States v. Gleneagles Inv. Co., Inc.*, 565 F.Supp. 556, 583 (M.D. Pa. 1983) (holding that state law statute of limitations applicable to fraudulent transfer claims do not apply to the United States); *Finkel v. Polichuk (In re Polichuk)*, No. 08-10783ELF 2010 WL 4878789 (Bankr. E.D. Pa. Nov. 23, 2010) (IRS as “golden creditor” under section 544(b) and applying *Summerlin* to supersede statute of limitations under state law.)

**II. Minnesota Case Law Confirms that Constructive Fraud Existed at Common Law.**

The Minnesota Supreme Court has held that MUFCA was “a codification and an extension of [Minnesota’s] former law.”<sup>6</sup> *Lind v. O.N. Johnson Co.*, 282 N.W. 661, 667 (Minn. 1938). The Minnesota Supreme Court’s holding is consistent with the compilation of cases annotated by Donald E. Bridgman, Chairman of Committee on Uniform State Laws of Minnesota Bar Association, in 1921. (See 7 Minnesota Law Review 530 at 530 and n. 56) (collecting cases). Mr. Bridgman states when discussing Section 4 of the Uniform Fraudulent Conveyance Act (the section regarding insolvency-based constructive fraud) that “Section four states substantially the pre-existing law in Minnesota, as in the majority of States.” *Id.* at 530. Mr. Bridgman specifically noted that Minnesota cases “have held that where a person is insolvent and makes a voluntary conveyance, the necessary effect of his act is to defraud creditors, and the debtor will be presumed to have intended this necessary effect.” *Id.* (citing *Henry v. Hinman*, 25 Minn. 199 (1878); *Walsh v. Byrnes*, 40 N.W. 831 (Minn. 1888); *McCord v. Knowlton*, 82 N.W. 589 (Minn. 1900); *Underleak v. Scott*, 134 N.W. 731 (Minn. 1912); *Thysell v. McDonald*, 159 N.W. 958 (Minn. 1916)).

Indeed, the case cited by Defendants’ counsel at oral argument in support of his request that this Court disregard case law predating 1918, *National Surety Co. v. Wittich*, 237 N.W. 690 (Minn. 1931), only confirms the recognition of constructive fraud claims at common law prior to MUFCA’s enactment. In *Wittich*, the Minnesota Supreme Court was required to resolve the question of whether a transfer could “be adjudged void as against an existing creditor” if it was

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<sup>6</sup> The Romans even recognized constructive fraud concepts. See footnote 3, *supra*, at 395-396.

supported by a finding that it was made “in good faith without intent to defraud.” *Id.* at 691. The Court in *Wittich* reasoned a party may convey property in good faith “without consideration if the transaction did not leave him unable to satisfy his creditors.” *Id.* at 692 (citing *Filley v. Register*, 4 Minn. 391 (Minn. 1860) and *Underleak v. Scott*, 134 N.W. 731 (Minn. 1912)). The Minnesota Supreme Court then stated: “That would be true either before or after the adoption of the Uniform Fraudulent Conveyance Act. That act provides that a voluntary conveyance which leaves a debtor insolvent is fraudulent without regard to actual intent. Prior to the act the rule prevailed as laid down in *Underleak v. Scott*. . . .” *Id.* at 692. In *Underleak* the Minnesota Supreme Court held that “[Intent to hinder, delay, or defraud] may be *implied conclusively* from the circumstances surrounding the transfer, as where a debtor is insolvent, or fails to retain sufficient property to amply satisfy existing claims against him. . . . The rule undoubtedly is that the debtor must retain enough property to amply satisfy his creditors.” 134 N.W. at 733 (emphasis added).

The Court in *Wittich* also cited *Wetherill v. Canney*, 64 N.W. 818 (Minn. 1895), for authority that constructive fraud existed in Minnesota before the adoption of MUFCA:

It is that the deed, when read with the agreement, is void as to the plaintiff, *as a matter of law*, under the provisions of Gen. St. 1894, § 4218, and that no finding of fact to the effect that the deed was made to delay or defraud creditors was necessary. This section of the statute is limited by its terms to goods and chattels, *but the principle upon which it rests is a part of the common law*, and applies to realty as well as personality.

*Id.* at 819 (emphasis added).<sup>7</sup> See also *Anderson v. Lindberg*, 67 N.W. 538, 538 (Minn. 1896) (“Under the terms of Gen. St. 1894, § 4218, which is simply a statement of the common law rule

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<sup>7</sup> Gen. St. 1894, § 4218, codified at Ch. 50, section 1 of Minnesota Statutes of 1858, is applicable to transfers of goods and chattels *in trust*, which is not to be confused with more general transfers

..."). Thus, the Minnesota Supreme Court has (1) held in *Lind* that MUFCA was a codification of common law and (2) separately and specifically acknowledged that constructive fraud existed at common law in *Wittich*, *Underleak*, and *Wetherill*. A thorough reading of *Wittich* therefore confirms that MUFCA codified long-recognized common law constructive fraud claims, and expressly rejects the theory advocated by defendants at oral argument..

**III. Minnesota Case Law Confirms that Consumer Protection Statutes are Causes of Action Distinct From Constructive Fraud and Were Not Intended to Codify Common Law.**

The Minnesota courts could not have spoken more dispository that consumer protection statutes are not a codification of common law fraud: "*Consumer protection laws were not intended to codify the common law*; rather they were intended to broaden the cause of action to counteract the disproportionate bargaining power present in consumer transactions." *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 892 (Minn. Ct. App. 1992) (emphasis added) *aff'd*, 500 N.W.2d 788, 790 (Minn. 1993). This holding, contrasted with the holding of *Lind* that MUFCA is a codification of Minnesota's former law, leaves no doubt as to the distinct origins of consumer protection statutes (liabilities created by statute) and fraudulent conveyance claims (grounded in fraud). *See Lind*, 282 N.W. at 667. The unequivocal holdings of the Minnesota Supreme Court concerning the disparate origins of MUFCA and consumer protection statutes renders all case law cited to by defendants inapposite because each case cited arises in the context of consumer protection laws.

As the Minnesota Supreme Court has explained:

In the late 1950s many state legislatures enacted statutes designed to prohibit deceptive practices and to address the unequal

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of goods and chattels which, as described above, reverted back to a un-codified common law cause of action in 1863.

bargaining power often present in consumer transactions. . . . By 1981, every state in the United States had statutes providing for consumer protection enforcement by a state agency—commonly, as in Minnesota, the state attorney general—broad enforcement authority. . . . Minnesota's Consumer Fraud Act was adopted in 1963 to achieve the same purpose and provides the attorney general with authority to seek and obtain injunctive relief to protect consumers from unlawful and fraudulent trade practices in the marketplace.

*Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000) (citing *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 496 (Minn. 1996)). “In passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law. The legislature’s intent is evidenced by the elimination of common law fraud, such as proof of damages or reliance on misrepresentations.” *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001).

The case law cited and relied upon by defendants arises out of the context of consumer protection claims. The Trustee agrees that consumer protection claims are subject to subdivision 1(2), an undisputed proposition that has no bearing upon the issue of whether constructive fraud claims existed at common law prior to 1921. While consumer protection statutes resulted in liability “created by statute” due to the elimination of elements of common law fraud, codification of constructive fraudulent conveyance causes of action did not. The cause of action has always existed at common law as long as Minnesota has been a state.

#### **IV. Equitable Tolling Is Recognized by Minnesota Courts and Can Be Based on Third Party Conduct.**

For all the above reasons, application of the *McDaniel* test results in subdivision 1(6) being the operative statute of limitations. If this Court determines that subdivision 1(2) applies, the doctrine of fraudulent concealment or the doctrine of equitable tolling apply. There is no need to supplement the Trustee’s prior briefing on the doctrine of fraudulent concealment,

clearly recognized in Minnesota law. However, it is appropriate to address equitable tolling issues raised in the reply briefs and at the hearing.

Defendants' argument that Minnesota courts do not recognize the doctrine of equitable tolling is simply wrong. While there is a federal equitable tolling doctrine, Minnesota state courts have adopted their own equitable tolling doctrine, and have relied upon federal authority for guidance. In *Regents of University of Minnesota v. Raygor*, 620 N.W.2d 680, 687 (Minn. 2001), the Minnesota Supreme Court considered the application of equitable tolling, noting “[i]t is within the discretion of the district court to grant or deny equitable relief.” *See also Egge v. Depositors Ins. Co.*, No. A07-150, 2007 WL 2703137, at \*3 (Minn. Ct. App. Sept. 18 2007) (“A court may grant equitable relief by tolling a limitations period.”); *Anderson v. H-Window Co.*, No. C9-98-1103, 1999 WL 88953, at \*3 (Minn. Ct. App. Feb. 23, 1999) (“A limitations statute may bar an action, but it does not deprive the court of jurisdiction to determine if the facts of a particular case justify equitable tolling of the statute”); *Ochs v. Streater, Inc.*, 568 N.W.2d 858, 860 (Minn. Ct. App. 1997) (recognizing limitations period was subject to equitable tolling); *State by Khalifa v. Russell Dieter Enterprises, Inc.*, 418 N.W.2d 202, 206 (Minn. Ct. App. 1988) (“the time limit for filing a verified charge is . . . subject to equitable tolling.”); *Jones v. Consolidated Freightways Corp.*, 364 N.W.2d 426, 429 (Minn. Ct. App. 1985) (holding that limitations period was subject to equitable doctrine of tolling).

Indeed, the Court in *Finn* acknowledged the applicability of the doctrine to fraudulent transfer claims specifically, and in doing so expressly acknowledged that both the Eighth Circuit and Seventh Circuit have made clear that application of the doctrine “does not require any misconduct on the part of the defendant.” *Finn*, 2011 WL 5006458, at \*6 (quoting *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328-29 (8th Cir. 1995) and *Cada v. Baxter*

*Healthcare Corp.*, 920 F.2d 446, 452 (1990) (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)).

Accordingly, based upon the express recognition of the equitable tolling doctrine by Minnesota courts, and the cases cited at pages 36-37 of the Omnibus Memorandum, the Trustee respectfully submits that he has adequately pleaded fraudulent concealment to toll the running of the statute of limitations set forth at subdivision 1(2), if determined to be applicable.

### **CONCLUSION**

For all the reasons previously briefed and argued to the Court in the Trustee's Omnibus Memorandum of Law, as supplemented by the above authority, the Trustee respectfully requests that the Court deny Defendants' motions to dismiss and allow these cases to proceed with discovery and on the merits. If the Court determines that dismissal of any of the Trustee's claims is warranted based upon a statute of limitations defense, the Trustee requests that such dismissal is without prejudice and that he be granted 60 days to amend his complaints in order to comply with this Court's decision.

DATED: November 4, 2011

**LINDQUIST & VENNUM P.L.L.P.**

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CHAPTER 11 TRUSTEE OF  
PETTERS COMPANY, INC., ET AL.**

DATED: November 4, 2011

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CHAPTER 11 TRUSTEE OF  
PETTERS COMPANY, INC., ET AL.**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In re:

**Jointly Administered under  
Case No. 08-45257**

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Court File No. 08-45257

Debtors.

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Aron;	10-04205
Kanios, et al.;	10-04206
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Lancer Financial Services, LLC, et al.;	10-04427
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Ritchie Capital Management, L.L.C., et al.;	10-04440

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Defendants.

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**CERTIFICATE OF SERVICE**

Gretchen Luessenheide, of the City of New Hope, County of Hennepin, State of Minnesota, states that on November 4, 2011 she served the following document:

Omnibus Surreply Memorandum of Law in Opposition to Defendants' Motions to Dismiss

upon

National City Bank, as Custodian of the Chris M. Kanios 401(k) Savings Plan 405 Madison Avenue Toledo, OH 43604	Chad Clifford c/o Martin J. Mullen Rowe Allen Mullen LLP 4274 Executive Square 11th Floor La Jolla, CA 92037
McCord Christensen Holdings, LLC 827 S Bridgeway, Suite 110 Eagle, ID 83616	J. Richard Rock 1154 Nevada Avenue San Jose, CA 95125-3327

Metro I, LLC c/o Its Registered Agent 1220 North Market Street, Suite 804 Wilmington, DE 19801	Metro I, LLC; Metro II, LLC; Arrowhead Capital Management LLC; Arrowhead Capital Management Corp.; Arrowhead Capital Partners, II, L.P.; Arrowhead Capital Corporation; James N. Fry c/o James N. Fry Arrowhead Capital Management 601 Carlson Parkway, Suite 1250 Minnetonka, MN 55305
Metro II, LLC c/o Its Registered Agent 1209 Orange Street Wilmington, DE 19801	Arrowhead Capital Management, LLC c/o Its Registered Agent; Pali Capital, Inc., operating through its business division Burnham Hill Partners 2711 Centerville Road, Suite 400 Wilmington, DE 19808
Blue Point Management Ltd., Arrowhead Capital Finance, Ltd. Thistle House 4 Burnaby Street Hamilton HM11 Bermuda	Arrowhead Capital Finance, Ltd. c/o James N. Lawlor William F. Dahill Wollmuth Maher & Deutsch LLP 500 Fifth Avenue New York, NY 10110
Elistone Fund c/o Elise Scherr Frejka Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036	James N. Fry 1075 Tonkawa Rd. Long Lake, MN 55356
Metro Gem, Inc.; Metro Gem, LLC; Frank E. Vennes, Jr. c/o Frank E. Vennes, Jr. 3152 SW Porpoise Circle Stuart, FL 34997-8915	Epsilon Global Active Value Fund II-G, L.P. National Registered Agents 160 Greentree Drive Suite 101 Dover, DE 19904
West Landesbank AG c/o Tom McCaffery, Sonja Kardorf, Michael Frank, Branch Heads 7 World Trade Center 250 W. Greenwich Street New York, NY 10007	Epsilon Global Master Fund L.P.; Epsilon Global Master Fund II, L.P. Maples and Calder PO Box 309, Ugland House South Church Street George Town Grand Cayman KY1-1104 Cayman Islands
Westford Special Situations Fund Ltd.; Epsilon Global Active Value Fund II-G, Ltd; Epsilon Global Master Fund III - Structured Strategies, L.P.; Epsilon Global Active Value Fund III Ltd.; Capital Strategies Fund Ltd. HWR Services Limited Craigmuir Chambers PO Box 71 Road Town, Tortola British Virgin Islands	Epsilon Investment Management, LLC; Westford Asset Management, LLC First Canadian Place 100 King Street West Suite 5715 Toronto M5X 1A9 Ontario Canada

Epsilon Global Master Fund III - Structured Strategies, L.P. c/o Steve Goran Stevanovich 7521 Isla Verde Way Delray Beach, FL 33446	West LB AG, New York Branch c/o Timothy F. Brown Arent Fox LP 1050 Connecticut Ave NW Washington, DC 20036-5339
Nancy A. Wright 10633 Brunswick Circle Bloomington, MN 55438	Rhone Holdings II, Ltd. c/o Thomas K. Cauley, Bryan Krakauer, Brian McAleenan Sidley Austin LLP 1 South Dearborn Chicago, IL 60603
Barry Mukamal c/o Michael S. Budwick, Jonathan Feldman, Solomon Genet, Eric Ostroff Meland Russin & Budwick PA 200 S. Biscayne Blvd, Ste. 300 Miami, FL 33131	East River Offshore Ltd. c/o Jessica S. Etra, Matthew A. Feldman Willkie Farr & Gallagher LLP 787 Seventh Avenue New York, NY 10019-6099
Geoff Varga c/o Edward J. Estrada Reed Smith LLP 599 Lexington Ave., 22 <sup>nd</sup> Floor New York, NY 10022	Estate of Kenneth R. Cunningham III c/o Mr. Kenneth R. Cunningham, Jr. 11 Pinon Woods Drive Sedona, AZ 86351-7918
Greenwich Insurance Company c/o David M. Gische and Marcus B. Holladay Troutman Sanders LLP 401 9 <sup>th</sup> Street NW Washington, DC 20004-1234	EFO Holdings, L.P. & Cypress Financial c/o Lawrence J. Friedman, Michael Gaubert, James Krause, R. Brian Shields Friedman & Feiger LLP 5301 Spring Valley Rd, Suite 200 Dallas, TX 75254-2488
MIO Partners Inc. c/o Hugh Hill, Robin Keller Hogan Lovellus US LLP 875 Third Avenue New York, NY 10022	Kenneth Johnson c/o Jeffry Henderson, Harris Kay Henderson & Lyman 175 West Jackson Blvd, Suite 240 Chicago, IL 60604
Douglas A. Kelley Kelley & Wolter PA Centre Village Offices 431 South 7 <sup>th</sup> Street, Suite 2530 Minneapolis, MN 55415	Freestone Low Volatility Partners LP c/o Mark R. Jacobs Pryor Cashman LLP 7 Times Square New York, NY 10036-6569
The Breast Cancer Research Foundation c/o Robert Lemons, Sherri Toub Weil Gotshal & Manges LLP 767 5 <sup>th</sup> Avenue New York, NY 10153	Kelly Collins-Cunningham Trustee of Kenneth R. Cunningham III Trust 11 Pinon Woods Drive Sedona, AZ 86351-7918
Issa Moe Moss and Barnett 4800 Wells Fargo Center 90 South 7 <sup>th</sup> Street Minneapolis, MN 55402	Chase Bank, Trustee c/o Michael McElwee Varnum LLP Bridgewater Place PO Box 352 Grand Rapids MI 49501

Neal Gerber & Eisenberg LLP c/o Thomas C. Wolford Two North LaSalle Street Suite 1700 Chicago, IL 60602	Ark Royal Capital LLC c/o Deborah Perry 3800 Lincoln Plaza 500 North Akard Dallas TX 75201-3429
Northwestern Foundation c/o Grover C. Sayre Leonard O'Brien et al 100 S. Fifth Street Suite 2500 Minneapolis, MN 55402	Edward Randolph Shaw 722 South Sixth Street Brainerd MN 56401
Kevin J Short 150 S. 5th St. Ste 3260 Minneapolis, MN 55402	Taunton Ventures LP c/o Paul Taunton 9980 Deerbrook Drive Chanhassen, MN 55317
Palm Beach Finance Partners c/o Steven W. Thomas Thomas Alexander & Forrester LLP 14 27 <sup>th</sup> Avenue Venice, CA 90291	Gary Underdahl ASK Financial 2600 Eagan Woods Drive, Suite 400 St. Paul, MN 55121
Trent Tucker Non-Profit Organization 433 River Street Minneapolis, MN 55401	Huron Consulting Group, Inc. 4795 Paysphere Circle Chicago, IL 60674-4795
Northwater Entities c/o Matthew A. Feldman, Jessica Etra Wilkie Farr & Gallagher, LLP 787 7 <sup>th</sup> Avenue New York, NY 10019	Elite Landings, LLC; Petters Aviation LLC PO Box 16352 St. Paul, MN 55116-0352
Randall L. Seaver On behalf of Petters Capital, LLC 12400 Portland Avenue South Suite 132 Burnsville, MN 55337	Tobias S. Keller, David C. Kiernan Daniel Reidy Jones Day 555 California Street, 26 <sup>th</sup> Floor San Francisco, CA 94101
Daniel E. Reidy Theodore T. Chung Tara A. Fumerton Jones Day 77 W Wagner Chicago, IL 60601	Daniel J. Frisk, Don R. Grande Steven M. Light Grande Frisk & Carter 2700 12 <sup>th</sup> Ave. South, Suite 1 Fargo, ND 58103
Jonathan S. Feldman Meland Russin & Budwick PA 200 S. Biscayne Blvd, Ste 3000 Miami, FL 33131	Robin E. Keller Hogan Lovellus US LLP 875 3 <sup>rd</sup> Avenue New York, NY 10022

Matthew J. Flynn Jonathan Hackbarth Quarles & Brady 411 E. Wisconsin Ave. Milwaukee, WI 53202	
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via U.S. Mail to the addresses listed above and electronically by Notice of Electronic Filing upon all parties who have requested service in these cases by filing the same via ECF with the Bankruptcy Court in the District of Minnesota.

/e/ Gretchen Luessenheide  
Gretchen Luessenheide